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# Amy's defense wouldn't stand up in District courts

By Jay Mallin
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Amy Carter is coming to town this weekend to participate in a 1960s style demonstration protesting U.S. policy in Central America and South Africa.

She is expected also to engage again in "civil disobedience" — breaking the law — like that for which she, aging radical Abbie Hoffman, and 13 others were acquitted last week in Massachusetts.

If she does, she may find the courts in these parts take a dimmer view of such conduct than do those in Massachusetts.

A civil disobedience trial — and possibly the verdict — in the District of Columbia, for example, would be very different, experts say.

In a trial held in D.C. Superior Court any jury almost certainly would have been blocked from hearing the group's central defense — that they broke the law in a protest against CIA recruiting to prevent a supposedly "greater evil" in the form of U.S. actions in Central America.

Such an argument, known as the "necessity defense," has been ruled off-limits in the District for defendants ranging from rabbis protesting the treatment of Soviet Jews to anti-Contra demonstrators.

Henry Asbill, defense attorney in seven cases involving about 150 persons arrested for protesting outside the Soviet Embassy, said, "We raised it [the necessity defense] in all the cases."

In each one, he said, the U.S. Attorney's Office won an order from the judge prohibiting the protesters from arguing at their trial that protesting outside the Soviet Embassy was the only way they could fight a greater evil — Soviet mistreatment of Jews.

A centuries-old argument based in common law, the necessity defense would apply in a case where someone ran a red light in order to rush a heart-attack victim to the hospital. It's been used in a variety of circumstances, including an 1884 case in which British sailors starving on a life raft survived by killing and eating a dying teen-ager on the boat with them.

In the Carter-Hoffman case, defense attorneys were apparently able to convince the jurors that the same principle applied — the defendants acted from "necessity."

"A lot of us were not aware of what the CIA was into. It was shocking and alarming," said one juror who voted to acquit.

Had the case been tried in Washington, she probably would not have been allowed to hear such evidence.

"We have not been able to bring in necessity evidence in a single case," said Nina Kraut, a District lawyer who frequently represents protesters.

That's because the U.S. Attorney's Office here regularly asks judges to block defendants from raising the defense of necessity.

The requests are based on an appeals ruling in a 1980 case involving Mitch Snyder, an activist for the homeless, and 11 others who attempted to open the doors of two Washington cathedrals to the homeless one winter night. In that case, known as Griffin vs. United States, the D.C. Court of Appeals upheld a judge's decision to deny Mr. Snyder and his colleagues the necessity defense.

That decision set a tight enough standard for necessity that the U.S. Attorney's Office has been consistently able to win its motions preventing defendants from attempting to use the defense.

Because of the Griffin decision, "The only time it [necessity] will be successfully used is in a 'burning building' situation" where someone must break the law to prevent what would otherwise be certain loss of life, said Ms. Kraut.

A spokesman for U.S. Attorney Joseph diGenova refused to discuss his prosecutors' position on the necessity defense, saying "our court pleadings speak for themselves."

In a typical case involving protesters charged with demonstrating inside the Capitol last year, those pleadings asked D.C. Superior Court Judge Frank E. Schwelb to block the group from using both the First Amendment and necessity as a defense.

"The harm to be prevented, U.S. intervention, is not going to be directly affected by defendants' actions," prosecutors argued.

"The United States ... respectfully moves this court to find as a matter of law that a First Amendment defense ... and necessity defenses cannot prevail under the circumstances of this case, and, therefore, that the defendants should be prohibited from introducing evidence of this type at trial," prosecutors asked Judge Schwelb.

Frank Boyle, a law professor at the University of Illinois and author of a book titled "Defending Civil Resistance Under International Law," has been associated with necessity defenses in the District involving the rabbis and a man who poured a red fluid on Rabbi Meir Kahane recently.

He says it is much more difficult to present a necessity defense in Washington than elsewhere in the country.

"All we're arguing is that there are a series of defenses out there that any defendant is entitled to," he said. "If you should give these defenses to murderers, you should certainly give them to non-violent protesters."

Both sides concede much of the argument in Washington has been sparked by the question of whether defendants should be allowed to stage "political" trials.

In cases around the country involving protesters, whether they are anti-nuclear or anti-Soviet, the defendants have sought to put government policies on trial.

In the Carter-Hoffman case, Ramsey Clark, a former U.S. attorney general; Daniel Ellsberg, best known as the man who leaked the Pentagon Papers; and former Nicaraguan rebel leader Edgar Chamorro were among the defense witnesses.

Earlier this year, though, both Mr. Ellsberg and Mr. Clark were blocked from testifying before a jury in a protester case in D.C. Superior Court. Judge Luke C. Moore listened to the two men's testimony but ruled the jury could not be allowed to hear it.